MBF CARDS SERVICES SDN BHD A

v.

CHEW AH TOO

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: A-04-94-04]
31 JULY 2008 C

CIVIL PROCEDURE: *Appeal - Notice of appeal - Respondent not served with a properly endorsed notice - Whether service proper - Whether O. 49 Subordinate Courts Rules 1980 complied with*

D

The respondent as plaintiff obtained judgment against the appellant as defendant pursuant to an application made under O. 22 rr. 1 and 3 of the Subordinate Courts Rules 1980 ('SCR') in the sessions court. The appellant appealed to the High Court wherein the respondent raised a preliminary objection ('PO') that the notice of appeal served was not proper as it was not endorsed as required by O. 49 SCR. The learned judge allowed the respondent's PO. Hence, the appellant's appeal. E

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court: F

(1) 'Endorsed' means that the notice of appeal should be filed at the lower court registry where the filing fees together with the date of receipt of the notice of appeal will be imprinted by the "franked" receipt. The notice will then be processed by the administrative staff and attended to by the lower court registrar. In the minimum the notice would have been dated. Once the needful administrative actions are completed, that processed document would be extracted by the appellant for onward service to the respondent/s. The rules also require that a copy of the notice be sent to the High Court registry for further action where a reference number is given. (para 4) G H

(2) The appellant filed the notice of appeal on time but did not wait for the copies of the notice of appeal to be endorsed or returned. Instead, the appellant sent a copy of an unendorsed notice of appeal to the respondent. It was further revealed I

A and confirmed that the impugned notice of appeal had no number or date on it. The appellant also did not make any application for an abridgement of time and allowed the procedural flaw to subsist. (para 8)

B **(3)** Upon reading O. 49 r. 2(6) SCR, the requirement of the court's endorsement is not physically legislated into the sub-provision. Order 49 r. 2(3) SCR states that the notice of appeal shall be filed within 14 days from the day on which the decision is pronounced. Under r. 2(6) of O. 49 the same C format is applied in that "The notice of appeal shall be served by the appellant within the time limited for the filing of appeal ...". Simply put, the notice served must be the same notice filed earlier, but having undergone the administrative processes, not just a spare or unprocessed notice. (paras 13 & 14)

D **(4)** The date on the notice shows that it is filed and served within the 14-day period time frame. An identifiable notice is the requirement by the legislature. (para 17)

(5) With the current problems facing the courts administrative E staff, it would be almost impossible for an appellant to extract an endorsed notice of appeal within the statutory period of 14 days, let alone serve it within that same period. But that does not stop an aggrieved party from filing for an abridgment of time to serve the endorsed notice of appeal. A simple F application supported by reasonably good grounds would suffice to attract the sympathy of any judge. Here the appellant did nothing. (para 19)

(6) The fact that a copy of the endorsed notice of appeal was not G included in the record of appeal must surely mean that that document was not extracted from the court registry. Apart from that, it was openly admitted that if not for the unendorsed notice of appeal, no filed copy was ever served on the respondent. Without an endorsed copy extracted and H included in the record of appeal, the court was unable to compare and confirm whether that unendorsed notice was similar to the filed copy. (para 20)

I

(7) To allow an incompetent appeal in the circumstances of the case would occasion substantial injustice. If O. 2 r. 3 RHC was to be allowed to be adverted to by the appellant, it would result in the flouting of the strict rules in the judicial system and make O. 49 SCR ineffectual, let alone prejudice the respondent. (para 24)

(8) An appeal from the subordinate court is not "brought" until the notice of appeal is filed, whence it will be endorsed and the endorsed notice served (*Majlis Perbadanan Kangar v. Sonati Development Corporation Sdn Bhd*). (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Sesyen, responden selaku plaintif telah mendapat penghakiman terhadap perayu dalam satu permohonan di bawah A. 22 kk. 1 dan 3 Kaedah-kaedah Mahkamah Rendah 1980 ('KMR'). Perayu merayu ke Mahkamah Tinggi tetapi responden membangkitkan bantahan awal ('BA') bahawa notis rayuan tidak diserahkan secara teratur apabila ianya tidak diendors seperti yang dikehendaki oleh A. 49 KMR. Yang arif hakim membenarkan BA responden dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) 'Diendorskan' bermakna bahawa notis rayuan harus difailkan di pejabat pendaftaran mahkamah rendah di mana fee pemfailan beserta dengan tarikh penerimaan notis rayuan akan dicetak pada resit yang di'franked'kan itu. Notis kemudian akan diproses oleh kakitangan pentadbiran dan diteliti oleh pendaftar mahkamah rendah. Pada tahapnya yang minima, notis akan diberikan tarikh. Sebaik saja tindakan-tindakan perlu pentadbiran disempurnakan, dokumen yang diproses akan diambil oleh perayu bagi tujuan penyampaian kepada responden. Kaedah juga mengkehendaki bahawa satu salinan notis hendaklah dihantar ke pejabat pendaftaran Mahkamah Tinggi untuk tindakan lanjut di mana satu nombor rujukan akan diberi.

(2) Perayu telah memfail notis rayuan dalam tempoh masa tetapi tidak menunggu sehingga salinan-salinan notis rayuan diendorskan atau dikembalikan. Sebaliknya, perayu menghantar sesalinan notis rayuan yang tidak diendors kepada responden.

A Juga didedah dan disahkan bahawa notis rayuan yang dicabar itu tidak mempunyai nombor atau tarikh padanya. Selain itu, perayu tidak membuat sebarang permohonan untuk perlanjutan masa dan hanya membiarkan kecacatan prosedur tersebut berterusan.

B

(3) Membaca A. 49 k. 2(6) KMR, jelas bahawa keperluan pengendorsan oleh mahkamah tidak diperuntukkan di dalam sub-provision berkenaan. Aturan 49 k. 2(3) KMR menyatakan bahawa notis rayuan harus difailkan dalam masa 14 hari dari
C tarikh di mana keputusan dibuat. Di bawah k. 2(6) A. 49, format yang sama digunapakai, iaitu "Notis rayuan hendaklah diserahkan oleh perayu dalam masa yang dihadkan untuk pemfailan rayuan ...". Pendek kata, notis yang diserah hendaklah notis yang sama yang difailkan sebelumnya tetapi
D yang telah melalui beberapa proses pentadbiran, dan bukannya notis pendua atau yang tidak diproses.

(4) Tarikh pada notis menunjukkan bahawa ia difail dan diserahkan dalam tempoh masa 14 hari yang ditetapkan. Suatu notis yang
E boleh dikenalpasti adalah apa yang dikehendaki oleh undang-undang.

(5) Mengambilkira masalah-masalah semasa yang dialami oleh kakitangan pentadbiran mahkamah, agak mustahil bagi seorang perayu untuk mengambil notis rayuan yang diendorskan dalam
F tempoh masa statutori 14 hari, sementelah untuk menyerahkannya dalam tempoh masa yang sama. Namun ini tidak menghalang pihak yang terkilan dari memfailkan permohonan lanjutan masa untuk menyerahkan notis rayuan yang berendors itu. Satu permohonan biasa yang disokong oleh alasan-alasan yang agak
G munasabah adalah mencukupi untuk menarik simpati mana-mana hakim. Namun, di sini, perayu tidak berbuat apa-apa.

(6) Fakta bahawa satu salinan notis rayuan berendors telah tidak dikepilkan di dalam rekod rayuan semestinya bermakna bahawa
H dokumen tersebut tidak diambil keluar dari pejabat pentadbiran. Selain itu, ianya diakui secara terbuka bahawa selain notis rayuan berendors, tiada sebarang salinan yang difail telah diserahkan kepada responden. Tanpa adanya salinan berendors diambil dan dimasukkan di dalam rekod rayuan, mahkamah
I tidak berpeluang untuk membanding dan mengesahkan sama ada notis berendors tersebut adalah serupa dengan salinan yang difailkan.

(7) Membenarkan rayuan yang tidak berkompeten dalam halkeadaan kes ini akan membangkitkan ketidakadilan substantial. Jika A. 2 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 dibenarkan digunapakai oleh perayu, ia bererti membenarkan ketidakpatuhan kepada kaedah-kaedah ketat dalam sistem kehakiman dan menjadikan A. 49 KMR tidak berkesan. Sementelah, ia juga memprejudiskan responden.

(8) Rayuan dari mahkamah rendah tidak "dibawa" sehinggalah notis rayuan difailkan, iaitu bilamana ianya diendorskan dan notis berendors tersebut diserahkan (*Majlis Perbadanan Kangar v. Sonati Development Corp Sdn Bhd*).

Case(s) referred to:
Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 SC ***(refd)***
Majlis Perbadanan Kangar v. Sonati Development Corporation Sdn Bhd [2006] 4 CLJ 953 CA ***(refd)***
Ng Cheah Cheong v. Ong Sing Hock [2002] 7 CLJ 504 HC ***(refd)***
Subramanya Ayyar v. Swaminathan Chettiar AIR [1928] M 746 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 2 r. 3
Subordinate Courts Rules 1980, O. 22 rr. 1, 3, O. 49, O. 49 rr. 2(1), (2), (3), (4), (5), (6), 6(1)

Other source(s) referred to:
Bindra, *Interpretation of Statute,* p 235

For the appellant - Ong Gek Un; M/s Yee Teck Fah & Co
For the respondent - Ng Yook Woon; M/s Ng Yock Woon Andrew TC Saw & Co

[Appeal from High Court, Ipoh; Civil Appeal No: 12-90-2002]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] We had unanimously dismissed the appeal with costs, and had affirmed the decision of the learned High Court judge who had refused the defendant's appeal (hereinafter referred to as the appellant) based on a preliminary objection raised by the plaintiff, hereinafter referred to as the respondent. At the subordinate

court's level the Sessions Court judge had allowed the respondent's application to enter a judgment under O. 22 rr. 1 & 3 of the Subordinate Courts Rules 1980. These provisions read as follows:

> 1. Without prejudice to Order 14, rules 2, 3, 4 and 19 a party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the Cause of any other party.
>
> 2. …;
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> 3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just.

[2] The brief facts of the case, as per the statement of claim, are as follows: on 8 May 1990, the respondent had entered a Merchant Agreement with the appellant, where the latter had agreed to purchase transactions by Mastercard holders at the respondent's establishment, which sells electrical goods. Pursuant to cl. 2 of the said agreement the appellant had agreed to honour all cards when properly presented on payment for goods and services from the cardholders. In accordance with the agreement, the appellant had installed an Electronic Point of Sale Terminal at the respondent's premise, for the purpose of authorizing the cards when presented. Cardholders did purchase the goods and services of the respondent with payment being made through those cards. The total number of goods and services purchased were valued at RM27,934.24. The purchases were verified and authorized by the appellant through the Electronic Point Sale Terminal.

[3] On 8 February 1995, the respondent had sent a notice to the appellant for the amount due, but was refused, resulting in him taking up an action at the Sessions Court to claim for the payment of the amount still owing. As stated above, the respondent on 4 April 2001 had filed an application to enter judgment against the appellant under O. 22 rr. 1 and 3 of the Subordinate Courts Rules 1980 pursuant to an admission of the

appellant that it had entered into the abovementioned Merchant Agreement. The Sessions Court judge on 14 August 2002 had allowed the respondent's application to enter judgment against the appellant. Being dissatisfied the appellant thereupon appealed to the High Court.

[4] Before the learned judge, the respondent raised a preliminary objection, in that he had not been served with a properly endorsed notice of appeal as required by O. 49 Subordinate Courts Rules 1980 ("SCR"). "Endorsed" here means that the impugned notice of appeal was yet to be filed at the lower court registry, where the filing fees together with the date of receipt of the notice of appeal will be imprinted by the "franked" receipt, thereafter to be processed by the administrative staff, and attended to by the lower court registrar. In the minimum, that notice would have been dated. At the end of the day, once the needful administrative actions have been completed, that processed document would be extracted by the appellant for onward service to the respondent or respondents. The Rules also require that a copy of the notice be sent up to the High Court Registry for further action where a reference number is supplied. The above flow chart is just a simple overview of what happens when a notice of appeal is filed before that document is extracted prior to service.

[5] What happened here was that, the appellant had served a notice of appeal on the respondent which had never been filed, processed or dated by the court, a shortcoming never denied by the appellant. In fact it was openly admitted by the latter that the need to act fast, in view of the time limit for service, required him to skip the statutory requirement.

[6] At the end of the submissions of parties before the learned judge the objection was allowed and the appeal dismissed. Before us the main grounds of appeal were that, *inter alia*, the learned judge had erred by failing to hold that the respondent's preliminary objection could not be sustained in view of the provisions of O. 1A of the RHC 1980, and dismissing the appellant's appeal without hearing it on its merits, let alone there was no requirement in law to have a notice endorsed by the court before its service on the respondent.

[7] Before this panel, it was a repeat performance of what happened at the High Court when the same stance was undertaken by the opposing parties, and supplying the same authorities to buttress their respective views. To appreciate what happened during the appeal before us I herewith reproduce the relevant portion of the notes of proceedings:

Respondent: Our complaint:

– whether notice ought to be endorsed

– if not endorsed then O. 49 not complied.

– I received an unendorsed Notice of Appeal.

– That was the only Notice of Appeal.

Never received any other sealed copy. Never endorsed and time was never abridged.

Appellant: 1. We did not send an endorsed copy to the Plaintiff.

2. We filed Notice of Appeal in court.

– Decision : 14.8.02
– Last date: 28.8.02
– Filed in court:16.8.02
(on time)

– served on 16.8.02.

– We took no rectification action.

– We filed Record of Appeal on 24.8.02.

– High Court dismiss on 26.3.03.

Yet: still no rectification action …

[8] The chronology of events and antecedents established that the appellant had indeed filed the notice of appeal on time but did not wait for the copies of the notice of appeal to be endorsed or returned. Instead, the appellant had merely sent a copy of an unendorsed notice of appeal to the respondent. Whether a photosated copy or a carbon copy was sent remains unclear. The

notes of proceedings at the High Court, dated 26 March 2003, further revealed and confirmed that the impugned notice of appeal had no number or date on it. It was also admitted that the appellant had not made any application for an abridgement of time subsequently but had allowed the procedural flaw to subsist.

[9] To appreciate the problem before us, it will be useful if the relevant provision of O. 49 SCR 1980 is reproduced. It reads as follows:

Order 49

Appeals To High Court

1. In this Order "decision" includes "judgment", "order" and "decree".

2. (1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.

(2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.

(4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.

(5) ...

(6) The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

[10] As one reads further the complete O. 49 SCR, by the inclusion of the amended O. 49 r. 6(1) *vide* P.U(A) 193/1993, interlocutory matters are still appealable though the procedures have been modified. Since the matter before the panel emanated from a full trial then O. 49 r. 2 sub-rules (1), (2), (3), (4), (5) and (6) take centre stage.

[11] The cardinal rule of construction of a statute, or for that matter Rules framed under a statute, is to read them literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning, though it should not be construed so as to impute absurdity to the legislature (*Subramanya Ayyar v. Swaminathan Chettiar* AIR [1928] M 746). The test thus is to see whether the interpretation is a sound one or not. If it leads to some injustice and or absurdity then a need arises to gauge the real and true intention of the legislature (*Interpretation of Statute* by Bindra p. 235). Obviously a harmonious construction should be given in order to avoid making one provision of the Act conflict with the other. Obviously too, in the circumstances of the case, scrutinising O. 49 r. 2(6) SCR 1980, it cannot be read in isolation, as to do so, would render the purpose of this provision impracticable. It has to be read in conjunction with O. 49 r. 2(3) SCR.

[12] Learned counsel for the appellant had ventilated, referring to *Ng Cheah Cheong v. Ong Sing Hock* [2002] 7 CLJ 504 as his authority, that nothing was stated in O. 49 r. 2(6) SCR, that the notice of appeal to be served by the appellant within the time limited for the filing of appeal must be endorsed. The learned judge in *Ng Cheah Cheong v. Ong Sing Hock (supra)* had likewise failed to find the requirement, and had opined:

> This court is of the view that in the face of this express provision in r. 2(6) of O. 49 of the SCR 1980 which is crystal clear, so plain and unambiguous there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be an usurpation of the legislative function and an extension to the Parliamentary language and this court would then be encroaching into the domain of the legislature and importing words into the rules of the court which have infact statutory force (see s. 17(4) and (5) of the Courts of Judicature Act 1964). This court is reminded that the function of this court is "interpretation, not legislation."

[13] Having read O. 49 r. 2(6) SCR it is obvious to all and sundry that the requirement of the court's endorsement has not been physically legislated into this sub-provision. But must this provision be read in isolation, by totally ignoring the rest of the sub-provisions of O. 49 SCR, and in the process result in a disharmonious construction of this procedural provision?

[14] Order 49 r. 2(3) SCR succinctly states that the notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. Under r. 2(6) of O. 49 the same format is applied in that "The notice of appeal shall be served by the appellant within the time limited for the filing of appeal …". In simple words the notice served must be the same notice filed earlier, but having gone through the administrative processes, and not just any spare or unprocessed notice to be served.

[15] Statutorily, the filing and the service thus must be carried out within that 14-day period, from the day the decision was pronounced. By sequence the filing must come first to be caught up by that service. The inevitable question as regards the 14 days period is how is the court to know that the notice has been filed and served within the allocated time frame, unless a date is shown in the notice. Harun Mahmud Hashim SCJ in *Lee Lan v. Lim Yoon Loy & 2 Ors* [1991] 1 CLJ 251; [1991] 3 CLJ 2393 at 2396 had occasion to remark:

> SCR O. 49 r. 2(3) provides that the notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. It follows that the notice of appeal to be served on the respondent under SCR O. 49 r. 2(6) must show the date on which the notice of appeal was filed in the court appealed from. This will show the respondent that SCR O. 49 r. 2(3) has been complied with. (emphasis added)

[16] Further the Federal Court stated:

> The 1991 amendment has now put the position beyond dispute. The correct procedure then is this:
>
> (a) First file the notice of appeal in the court appealed from within 14 days from date of the decision.
>
> (b) Next, serve a copy of the notice of appeal showing the date on which it was filed in court, on the respondent or his solicitor, also within 14 days from date of the decision.

A **[17]** An identifiable notice ie, a notice that has been filed thus is the requirement by the legislature, and not just any notice, that shall be served.

[18] With respect to VT Singham J, in *Ng Cheah Cheong v. Ong*
B *Sing Hock (supra)*, who attempted to distinguish the above Federal Court's case with the one before him, failed to appreciate the presence of the requirement of the endorsement of the court in O. 49. The question of importing words into the rules did not arise as they were already there. To state that a notice of appeal
C which has been filed in court, attracted the attention of the registrar, who thereafter processed the notice and indicate the date when the notice of appeal was filed, as not being an endorsement, is a view that is without merit.

D **[19]** It is indisputable that with the current problems facing the court's administrative staff, it would be nigh impossible for an appellant to extract an endorsed notice of appeal within the statutory period of 14 days, let alone serve it within that same period. But that does not stop an aggrieved party from filing for an abridgment of time to serve the endorsed notice of appeal. A
E simple application supported by reasonably good grounds would suffice to attract the sympathy of any judge. Here the appellant did nothing.

[20] The fact that a copy of the endorsed notice of appeal was
F not included in the record of appeal must surely mean that that document was not extracted from the court registry. Apart from that, it was openly admitted that if not for the unendorsed notice of appeal, no filed copy was ever served on the respondent. Without an endorsed copy extracted, and included in the record
G of appeal, we were unable to compare and confirm whether that unendorsed notice was similar to the filed copy. With those set of facts before us, we must assume that the appellant had abandoned the appeal as per the filed notice of appeal.

H **[21]** At the risk of repeating, to exacerbate matters, despite serving an unidentifiable and unendorsed notice of appeal, the appellant made no attempts to file any application, be it for abridgment of time or rectification application supported by good grounds justifying that course of action. This issue of non-
I application of an abridgment of time also caught the attention of the learned judge Abdull Hamid Embong J (as he then was) when he remarked:

> This to me is lame, and unacceptable, more so since there is recourse for it to enlarge the time set out by a simple application to the Court. To accept this excuse put forward would mean that this Court would completely ignore the procedures provided by O. 49 RHC. This Court could not be too lenient in the face of such a feeble excuse.

[22] In the course of the appeal the appellant had further adverted to O. 1A and O. 2 r.3 of the Rules of the High Court 1980 ("RHC"), and ventilated that the non-compliance with the abovementioned r. 49 SCR had not caused any miscarriage of justice. Order 1A of the RHC states:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[23] Order 2 r. 3 RHC 1980 promulgates:

> A court or a judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[24] Reading the above provisions of O. 1A and O. 2 r. 3 of the RHC 1980 together with O.49 r. 2 (6) SCR, we are not unmindful of the fact that, to ensure compliance, Parliament had adverted to the term "shall". *Prima facie*, when a statute uses the word "shall", it is meant to have a mandatory effect, though there may be considerations, which may dilute the effect of that word. With the promulgation of O. 1A RHC 1980 it is our view that some discretion was passed down to the courts to ensure that a civil litigation is not prevented by mere non-compliance of procedural rules. In order to apply that discretion, there must be some evidence before us to warrant circumventing the strict rules, to allow the appellant its day in court. Clearly the service of the impugned unendorsed notice could not have salvaged its case as there was no evidence to show that this notice was similar to the filed ones. The want of any rectification exercise did not help the appellant's predicament either. Having considered the matter in its totality we were satisfied that to allow an incompetent appeal in the circumstances of the case would occasion a substantial injustice. Further, if O. 2 r. 3 RHC were to be allowed to be

A adverted to by the appellant, it would result in the flouting of the strict rules in our judicial system and make O. 49 SCR ineffectual, let alone prejudice the respondent.

[25] To sum it up, an appeal from the subordinate court is not B "brought" until the notice of appeal is filed, whence it will be endorsed and the endorsed notice is served (*Majlis Perbadanan Kangar v. Sonati Development Corporation Sdn Bhd* [2006] 4 CLJ 953). Based on all the above reasons we thereupon had dismissed the appeal with costs and affirmed the decision of the learned C judge.

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